STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

PLAINTIFFS-APPELLANTS,

-VS-

FLOYD PHILLIP ALLEN,

DEFENDANT-APPELLEE.

Supreme Court No. 151843

Court of Appeals No. 318560

Lower Court No. 13-15693-FH
8th Judicial Circuit Ionia County

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DEFENDANT-APPELLEE, FLOYD PHILLIP ALLEN'S, ANSWER TO THE PEOPLE'S APPLICATION FOR LEAVE TO APPEAL

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ANSWER TO PEOPLE'S APPLICATION FOR LEAVE TO APPEAL
BY DEFENDANT-APPELLEE, FLOYD PHILLIP ALLEN

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STATEMENT IDENTIFYING THE JUDGMENT

The People, Plaintiffs-Appellants, are seeking Leave to Appeal from the published Opinion of the Michigan Court of Appeals dated April 30, 2015, which granted Mr. Allen a Re-Sentencing because "defendant's sentence should not have been enhanced under MCL 769.10(1)(a) where that statute directly conflicts with the sentencing enhancement provision contained in MCL 28.729(1)(b). Because , MCL 28.729(1)(b) is more specific, it is controlling and defendant's maximum prison sentence should not have exceeded seven years." *People v Allen,* ____ Mich App ___; ____ NW2d ____ (2015) (Docket No. 318560, 13).

QUESTION PRESENTED FOR REVIEW

I. WAS MR. ALLEN ENTITLED TO A RE-SENTENCING BECAUSE THE TRIAL COURT ERRED BY ENHANCING HIS SENTENCE UNDER BOTH THE HABITUAL OFFENDER STATUTE AND THE SORA VIOLATION SECOND OFFENDER STATUTE?

THE TRIAL COURT DID NOT ANSWER THIS QUESTION.
PLAINTIFFS-APPELLANTS ANSWERED THIS QUESTION, "NO".
DEFENDANT-APPELLEE ANSWERED THIS QUESTION, "YES".
THE COURT OF APPEALS ANSWERED THIS QUESTION, "YES".

GROUNDS

The People, Plaintiffs-Appellants, assert three grounds that warrant Leave to Appeal. All three grounds asserted are misapplied to the facts of this case:

1. Per, MCR 7.302(B)(5), because the decision conflicts with a Michigan Supreme Court's decision in *People v Bewersdorf,* 438 Mich 55; 475 NW2d 231 (1991). However, the People, Plaintiffs-Appellants', proposition is unfounded. "[S]tatutes which may appear to conflict are to be read together and reconciled, **if possible**." (Emphasis added) *Bewersdorf, supra,* 68, citing *Detroit Police Officers Ass'n v Detroit,* 391 Mich 33, 65; 214 NW2d 803 (1974). Here, the Legislature did not intend that a sentence for a subsequent (or second) SORA violation be enhanced under both the SORA enhancement provision and the habitual offender provisions.

2. The People, Plaintiffs-Appellants, claim, per "MCR 7.302(B)(5) because 'the decision conflicts with . . . [other] decisons[s] of the Court of Appeals,' namely *People v Lynch,* 199 Mich App 422; 502 NW2d 345 (1993) . . . *People v Brown,* 186 Mich App 350; 463 NW2d 491 (1990)." Again, such an assertion is misplaced as Mr. Allen was subject to sentence enhancement under the SORA Registration Act, his sentence could not be enhanced under the habitual offender provisions. In other words, if some other prior felony conviction (other than the previous conviction for Failing to Comply with SORA) had been used to charge Mr. Allen as a 2nd Felony Habitual Offender, he could have been sentenced under both enhancements.

Further, query, how can the decision in the instant case be in conflict with a case it relied on as basis for its decision? *Brown, supra,* was relied on by the Court of Appeals in its published Opinion, 12:

> "'Where there is a conflict [between sentencing schemes], the specific enhancement statute will prevail to the exclusion of the general one.' *People v Brown,* 186 Mich App 350, 356; 463 NW2d 491 (1990). Here, because MCL 28.729(1)(b) is more specific—i.e. it applies specifically to SORA convictions whereas MCL 769.10(1)(a) applies to convictions in general—it is controlling and defendant's maximum prison sentence should not have exceeded seven years."

Lastly, the instant case was completely consistent with *People v Petterley,* 229 Mich App 511; 583 NW2d (1998):

> "Consistent with the cases discussed above, we conclude that the Legislature did not intend that sentences for subsequent controlled substance offenses be quadrupled by enhancement under both the habitual offender provisions and the controlled substance enhancement provision. A careful reading of the cases reveals three consistent principles. Where a defendant is subject to sentence enhancement under the controlled substance provisions, the sentence may not be doubly enhanced under the habitual offender provisions."

3. The People, Plaintiffs-Appellants' claim, per MCR 7.302(B)(5), because "the decision is clearly erroneous and will cause material injustice." Again, such an assertion is misplaced as Mr. Allen was paroled on March 24, 2015, and his parole supervision will end on June 24, 2016 (MDOC: OTIS). Thus, this ground claimed by the People, Plaintiffs-Appellants', is, in reality, moot.

CONCISE STATEMENT OF THE MATERIAL FACTS AND PROCEEDINGS

In this matter, Defendant-Appellee, Floyd Phillip Allen, claimed an Appeal by Right, pursuant to MCR 7.203(A)(1) and MCR 7.204(A)(2), from the jury trial conviction and Judgment of Sentence entered in the Circuit Court for the County of Ionia, State of Michigan, per the Honorable David A. Hoort.

The one-day jury trial was conducted on June 26, 2013. Mr. Allen was found guilty of Failing to Register, 2nd Offense (Tr, 1 and 228-229). In addition, at sentencing on October 1, 2013, Mr. Allen was determined to be a 2nd Felony Habitual Offender, MCL §769.10 (Sent, 6-7 and Judgment of Sentence).

Mr. Allen sought to have the Court of Appeals reverse his conviction, vacate his sentence, and remand this matter back to the trial court for a new trial. In support for the relief he sought, Mr. Allen asserted six issues, one of which was

> "IV. MR. ALLEN IS ENTITLED TO A RE-SENTENCING BECAUSE THE TRIAL COURT ERRED BY ENHANCING HIS SENTENCE UNDER BOTH THE HABITUAL OFFENDER STATUTE AND THE SORA VIOLATION SECOND OFFENDER STATUTE"

In its published Opinion, the Court of Appeals agreed, Opinion, 12:

> "'Where there is a conflict [between sentencing schemes], the specific enhancement statute will prevail to the exclusion of the general one.' *People v Brown*, 186 Mich App 350, 356; 463 NW2d 491 (1990). Here, because MCL 28.729(1)(b) is more specific—i.e. it applies specifically to SORA convictions whereas MCL 769.10(1)(a) applies to convictions in general—it is controlling and defendant's maximum prison sentence should not have exceeded seven years."

ARGUMENT

I. MR. ALLEN WAS ENTITLED TO A RE-SENTENCING BECAUSE THE TRIAL COURT ERRED BY ENHANCING HIS SENTENCE UNDER BOTH THE HABITUAL OFFENDER STATUTE AND THE SORA VIOLATION SECOND OFFENDER STATUTE

PRESERVATION OF ISSUE:

This issue was preserved for review by having been argued and decided in the Michigan Court of Appeals.

STANDARD OF REVIEW:

This issue was reviewed in the Michigan Court of Appeals under the plain error standard. The plain error standard required the defense to establish the following: 1) there was an error; 2) the error was plain, meaning clear or obvious; 3) the error caused prejudice or affected substantial rights or affected the outcome of trial; and 4) the error resulted in the conviction of an innocent person or "seriously affect[ed] the fairness, integrity or public relation of judicial proceedings independent of the defendant's innocence." *People v Carines,* 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Whether a statute has been properly applied is reviewed *de novo, People v Hegwood,* 465 Mich 432, 436; 636 NW2d 127 (2001). Questions of statutory interpretation or construction is reviewed *de novo, People v Austey,* 476 Mich 436, 442; 719 NW2d 579 (2006) and *People v Houston,* 473 Mich 399, 403; 702 NW2d 530 (2005).

People v Fetterly, 229 Mich App 511; 583 NW2d 199 (1998):

> "Provided permissible factors are considered, appellate review of sentencing determinations is limited to whether the sentencing court abused its discretion. *People v Odendahl,* 200 Mich App 539, 540-541; 505 NW2d 16 (1993). However, we review questions of statutory interpretation de novo. *People v Thomas,* 438 Mich 448, 452; 475 NW2d 288 (1991)."

DISCUSSION:

Here, Mr. Allen was charged (Information) with: Failing to Comply with SORA, MCL §28.729(1)(a), a 4 year maximum felony offense; Second Offense Notice, MCL §28.729(1)(b), for having been previously convicted of Failing to Comply with SORA, making it a 7 year maximum felony offense; and for being a 2nd Felony Habitual Offender, MCL §769.10, causing the maximum sentence to be raised to "One and one-half times the maximum sentence on primary offense or a lesser term."

The trial court elevated the 7 year maximum of the Failure to Comply Second Offense Notice by one and one-half times per MCL §769.10 to a maximum sentence of 126 months (ten and one-half years) (Judgment of Sentence and Sent, 7). Mr. Allen submits that such sentencing was invalid, unlawful, and wholly improper.

The question presented was whether it was lawful for a trial court to impose enhanced sentences with both a 2nd offense Failure to Register and an Habitual Felony Offender. The statute under which Mr. Allen was convicted provides for a maximum penalty of 4 years in prison. With it being a 2nd offense, the maximum penalty is elevated to 7 years. The trial court imposed a 2nd Felony Habitual Offender which increased the maximum penalty by 50%. It purportedly increased his maximum penalty from 7 years to 10.5 years.

The answer is based on *People v Eilola*, 179 Mich App 315; 445 NW2d 490 (1989): it depends. In *Eilola*, *supra*, the Defendant's

> ". . . prior retail fraud conviction was used to enhance defendant's present conviction to first-degree retail fraud, but was not used to establish defendant's status as a habitual offender. Rather, six other prior felony convictions were used under the habitual offender notice to establish defendant's status as a fourth-offense habitual offender. Consequently, there was no error when the trial court enhanced defendant's sentence under both the retail fraud and habitual offender statutes."

Eilola, supra, was definitively refined in *People v Fetterley,* 229 Mich App 511; 583 NW2d (1998). In *Fetterly, supra,* the Defendant argued that the trial court erred by enhancing his sentences under both the habitual offender provisions, MCL §769.11(1)(a), and the controlled substance provisions of the Public Health Code, MCL §333.7413(2). By enhancing under both statutes, the trial court imposed sentences that quadrupled the original maximum sentences for the underlying offenses. The Court concluded that the Legislature did not intend that a sentence for a subsequent drug offense be quadrupled by enhancement under both enhancement provisions, and we therefore remand for resentencing.

The *Fetterly, supra,* 540-541, Court held:

> "Consistent with the cases discussed above, we conclude that the Legislature did not intend that sentences for subsequent controlled substance offenses be quadrupled by enhancement under both the habitual offender provisions and the controlled substance enhancement provision. A careful reading of the cases reveals three consistent principles. Where a defendant is subject to sentence enhancement under the controlled substance provisions, the sentence may not be doubly enhanced under the habitual offender provisions. *Edmonds; Elmore.* Where a defendant commits a controlled substances offense, but is not subject to the enhancement provisions of the Public Health Code because, although the defendant is an habitual offender, there are no prior controlled substance offenses, enhancement under the habitual offender provisions is permitted. *Franklin; Primer.* Where the legislative scheme pertaining to the underlying offenses elevates the offense, rather than enhances the punishment, on the basis of prior convictions, both the elevation of the offense and the enhancement of the penalty under the habitual offender provisions is permitted. *Brown; Eilola; Lynch; Bewersdorf."*

In the instant case, Mr. Allen was charged (Information) with: Failing to Comply with SORA, MCL §28.729(1)(a), a 4 year maximum felony offense; Second Offense Notice, MCL §28.729(1)(b), for having been previously convicted of Failing to Comply with SORA, making it a 7 year maximum felony offense; and for being a 2nd Felony Habitual Offender, MCL §769.10, causing the maximum sentence to be raised to "One and one-half times the maximum sentence on primary offense or a lesser term."

The trial court's imposition of a maximum sentence of 10.5 years was predicated on Mr. Allen having a prior felony conviction (Information) for Failing to Comply with SORA (Information: HABITUAL OFFENDER - SECOND OFFENSE NOTICE). Mr. Allen contends that because he was subject to sentence enhancement under the SORA Registration Act, his sentence could not be enhanced under the habitual offender provisions. In other words, had some other prior felony conviction (other than the previous conviction for Failing to Comply with SORA) been used to charge Mr. Allen as a 2nd Felony Habitual Offender, he could have been sentenced to a maximum of 10.5 years.

Mr. Allen contends that the Legislature did not intend that a sentence for a subsequent SORA violation be enhanced under both the habitual offender provisions and the SORA enhancement provision. Therefore, Mr. Allen could not legally have been sentenced to a maximum of 7 years, MCL §28.729(1)(b).

Admittedly, the prosecution's arguments have some validity under certain circumstances. If the prosecution had relied upon a different prior (underlying) felony conviction, aside from the prior failure to comply with SORA (which elevated both the underlying offense to a 2nd Offense and the sentence maximum from four years to seven years (Information)), then the prosecution would have a valid argument. It is the facts of the instant case and how the prosecution chose to proceed that distinguishes it, *Fetterly, supra, Brown, supra,* and *Eilola, supra,* from *Bewersdorf, supra,* and *Lynch, supra.*

RELIEF SOUGHT

WHEREFORE, Mr. Allen prays this Honorable Court: deny the People, Plaintiffs-Appellants' Application for Leave to Appeal; or, if Leave to Appeal is granted, Affirm the Opinion of the Michigan Court of Appeals; and, lastly, Mr. Allen prays this Honorable Court grant unto him any other or further relief to which he may be found to be entitled in the interest of justice, equity, and good conscience.

Respectfully submitted,

Dated: July 17, 2015

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